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No. 81-146

In the Supreme Court of the United States

OCTOBER TERM, 1980

W. DARRELL ZANG AND LOUIS PORTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals over "all appeals from the district courts of the United States in cases and controversies arising under" the Emergency Petroleum Allocation Act of 1973 extends to an appeal by a criminal defendant from a judgment convicting him on charges of mail fraud, wire fraud, racketeering, and conspiracy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-8a) is not yet reported. That court's earlier opinion dismissing petitioners' appeals from the denial of their motions to dismiss the indictment is reported at 645 F. 2d 999.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on June 23, 1981 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioners were convicted on one count of conspiracy to commit mail and wire

fraud and to defraud the United States (18 U.S.C. 371), six counts of mail fraud (18 U.S.C. 1341), eight counts of wire fraud (18 U.S.C. 1343), and one count of investing income derived from a pattern of racketeering activity in the acquisition and operation of an enterprise engaged in interstate commerce (18 U.S.C. 1962(a)). Petitioners were each sentenced to five years' imprisonment and a fine of $49,000, and their interests in certain businesses were forfeited.

The evidence at trial, which is not in issue here, showed that petitioners reaped an illegal profit of almost $7.5 million by reselling oil at an inflated price. Between December 1976 and September 1978, petitioners purchased quantities of oil from Cities Service Corporation at the maximum price for "old" oil. They then resold this oil to Western Crude Oil, Inc. ("Western"), as either "new" or "exempt" oil. See 645 F. 2d 999, 1000-1001 (1981).[1] Western had agreed to pay petitioners their cost of acquiring the oil plus a customary fee for gathering and handling. *Id.* at 1001. As a result of petitioners' fraud, Western paid petitioners at an inflated rate and resold the falsely priced oil to its own purchasers, including Charter Oil Co., Gulf Oil Co., and OKC Corporation. These refiners passed along to the Department of Energy the false information generated by

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[1] "Old" oil is that amount of domestically produced oil that falls under a previously calculated base level of production for a particular oil-producing property. See 645 F. 2d at 1001 n.1. For the time period encompassed by the instant indictment, Cities Service's maximum selling price for "old" oil was approximately $5.25 per barrel. *Id.* at 1000-1001 n.1. "New" oil is that amount that exceeds a property's base period level of production. *Id.* at 1001 n.2. The average selling price for "new" West Texas crude oil during the indictment period was approximately $11.25 per barrel. *Ibid.* "Exempt" oil includes other categories of oil, such as stripper or foreign, that were exempt from price controls. *Ibid.* The average price, during the indictment period, of West Texas stripper crude oil was about $13.50 per barrel. *Ibid.*

petitioners concerning the designation of the oil in question. Petitioners' miscertification of the oil thus frustrated the Department of Energy's program to monitor and regulate the maximum lawful selling price for crude oil. In addition, petitioners' fraudulent scheme resulted in increases in the prices of oil and gasoline sold to the public. *Id.* at 1001-1002.

Prior to trial, petitioners moved to dismiss the indictment, arguing, *inter alia*, that the misdemeanor sanctions imposed by Section 5 of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754 ("EPAA"), preempted or impliedly repealed the general criminal statutes under which petitioners were charged in the indictment. See 645 F. 2d at 1000, 1012. The district court denied the motions and the Temporary Emergency Court of Appeals ("TECA") dismissed petitioners' interlocutory appeals. TECA concluded that because the instant indictment charged various offenses under Title 18 of the United States Code, the charges did not "aris[e] under" the EPAA and hence the court lacked jurisdiction over the appeals. 645 F. 2d at 1002-1005.

Following their convictions, petitioners filed simultaneous appeals in both the Tenth Circuit and TECA.[2] Relying on its earlier decision in this case, TECA again dismissed petitioners' appeals (Pet. App. 2a-8a). The court reiterated that petitioners were prosecuted not for violation of the EPAA miscertification regulations but for general criminal offenses. The court further noted that "[petitioners'] repeated efforts to have this court take over jurisdiction of [their] appeals have resulted in delay in the disposition of these appeals by the Tenth Circuit Court of Appeals upon

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[2]Petitioners have filed their appellate briefs in the Tenth Circuit but have requested that their appeals to that court be stayed pending resolution of the instant petition (Pet. App. 3a; Pet. 2).

which Congress has expressly conferred jurisdiction under 28 U.S.C. § 1291, and it is inimical to the goal of expeditious review of criminal cases for this Court to interfere with the Tenth Circuit Court in the disposition of these appeals" (Pet. App. 7a).

ARGUMENT

Petitioners contend that the EPAA and its underlying regulations formed the basis for their indictment, and that therefore TECA has exclusive appellate jurisdiction over the appeals from their criminal convictions. This argument is without merit.

Under Section 211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, which is incorporated into Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), TECA has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under" the EPAA. As TECA twice correctly held (Pet. App. 7a; 645 F. 2d at 1001-1003), petitioners' criminal prosecution is not a case or controversy "arising under" the EPAA. Petitioners' activity was made criminal not because they violated the EPAA regulations, but rather because they misrepresented the price at which they obtained the oil and they used or caused the use of the mails and wire communications to facilitate this fraud. Thus, contrary to petitioners' claims, the EPAA did not form the basis for their indictment. See *United States* v. *Uni Oil, Inc.*, 646 F. 2d 946, 949 (5th Cir. 1981).

The decision below is consistent with *Bray* v. *United States*, 423 U.S. 73 (1975), where this Court held that TECA did not have jurisdiction over an appeal from a conviction for criminal contempt based on the defendant's failure to comply with an IRS subpoena issued in connection with an investigation under the Economic Stabilization Act of 1970. The Court recognized that "[n]othing in the Act or in its legislative history indicates that Congress intended 'to

include existing offenses, already covered under Title 18, under the umbrella of the Stabilization Act.' " *Id.* at 75, quoting from *United States* v. *Cooper,* 482 F. 2d 1393, 1398 (Temp. Emer. Ct. App. 1973). Noting that review of Bray's criminal contempt conviction by TECA was "not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme" (*Bray* v. *United States, supra,* 423 U.S. at 75), the Court observed that requiring TECA to review all criminal convictions related to enforcement efforts would burden TECA with additional appeals and undermine the statutory purpose of affording prompt resolution of Stabilization Act questions. *Ibid.*

The decision below is also in accord with an earlier decision of TECA and with the decision of the only other court of appeals that has specifically addressed the issue. Thus, in *United States* v. *Cooper, supra,* the defendant was prosecuted for making a false statement to an IRS agent (18 U.S.C. 1001) in connection with a Stabilization Act investigation. TECA dismissed the appeal, holding that the case was not one "arising under" the Stabilization Act. 482 F. 2d at 1397-1398. Similarly, in *United States* v. *Uni Oil, Inc., supra,* the defendants—like petitioners here—were charged with miscertifying "old" and "new" oil and were indicted on charges similar to those involved here. 646 F. 2d at 948-949. The Fifth Circuit held that it had jurisdiction over the appeal because the case did "not involve 'interpretation of the substantive provisions' of the EPAA" (*id.* at 952) and thus did not arise under the EPAA or its regulations. In light of these uniform decisions interpreting TECA's jurisdiction over appeals in cases involving violations of criminal statutes of general applicability, TECA correctly determined in this case that it did not have jurisdiction over petitioners' appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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